Supreme Court, U.S.
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No. 01-1184

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANCISCO JIMENEZ RECIO and
ADRIAN LOPEZ-MEZA
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR FRANCISCO JIMINEZ RECIO

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BRIEF FOR FRANCISCO JIMINEZ RECIO

STATEMENT

To the statement set forth in the Brief for the United States (2-10) Respondent would suggest that it is important to note that the majority below found that but for the intervention of law enforcement officials the drug laden truck would have been driven to the final destination by Manuel Soltelo and Romiero Arce, not left at the Karcher Mall by law enforcement officials where it was subsequently driven off by Respondent Recio. Pet. App. 6a, 13a (However, see Pet. App. 19a wherein Judge Gould in dissent suggests the truck was to have been left by Soltelo and Arce at the Karcher Mall). The finding of the majority in this regard is important to its determination that there was insufficient evidence to sustain the conspiracy convictions. Pet. App. 10a.

In addition, the language of the Superseding Indictment in which it is alleged that the conspiracy was effectuated ". . . on or about a date uncertain, but by November 18, 1997. . ." (Pet. App. 69a-70a) deserves emphasis in view of the narrowness of the panel's decision that there was insufficient evidence to sustain the conviction for the charged offense.[1]

SUMMARY OF ARGUMENT

Each of the three judges below set forth their views of the case. The majority opinion was joined by two of the panel; one of whom wrote a concurrence. There was a strong dissent. A reading of the majority opinion and the dissent makes clear that the decision to reverse was based on the majorities determination that there was insufficient evidence to support the conviction for the crime charged in the superseding indictment. The majority opinion and the dissent each made only passing reference to *United States v. Cruz*, 127 F. 3d. 791 (9th Cir. 1997), *cert. denied* 522 U.S. 1097 (1998). It is thus clear that the decision reached here was not predicated on *Cruz* and that *a fortiori* the correctness of *Cruz* and thus the question posited on *certiorari* here need not be reached.

Alternatively, as to the question posed in the petition for a writ of *certiorari*, the Respondent would suggest that in view of the public policies implicated in the law of conspiracy; e.g., combination of persons, dangerousness of joint enterprise, increased chance of success by combinations, etc., that these policy considerations are not advanced by a rule of law that a conspiracy does not end as a matter of law when the government frustrates it's objective. The purposes of the law of conspiracy are not enhanced by a rule that allows a "conspiracy" to proceed under the careful and watchful eye of government law enforcement agents. A "conspiracy" that has no likelihood of fruition because of governmental intervention poses no greater danger to society than that of an individual acting alone and suggests no purpose in applying the strictures of conspiracy law to its prosecution.

[1] The failure of Respondent to respond at greater length to the statement in the Brief for the United States, (2-9) is not to indicate agreement with what may be characterized as editorial comment or argument, but rather a view as to this Court's Rule 24 (1)(g) and the expectation that readers can and will separate the statement from the argument and that in so doing will perform the act of redaction that would otherwise be done by Respondent to ". . . leave the Court with what opposing counsel regards as an adequate picture of the case. . ." *Supreme Court Practice*, Seventh Edition, p. 546 (1993).

ARGUMENT

I. THE DECISION IN THIS CASE WAS BASED ON A VIEW OF THE SUFFICIENCY OF THE EVIDENCE, NOT STRICT ADHERENCE TO THE RULE OF *UNITED STATES V. CRUZ*, 127 F. 3D. 791 (9TH CIR. 1997), CERT. DENIED 522 U.S. 1097 (1988).

The Petitioner seeks to have this case decided on the basis of the correctness or incorrectness of *Cruz*. With due respect to the argument of the United States, Respondent would suggest that a reading of the decision below (Pet. App. 1a-44a) would indicate that the result was not reached because of adherence to *Cruz*, but rather because the evidence presented was simply not legally sufficient to prove the conspiracy charged in the Superseding Indictment (Pet. App. 10a). It was the Grand Jury's indictment that set forth the apposite time period for alleged involvement by the Respondent in the alleged conspiracy (". . . but by November 18, 1997." Pet. App. 69a). Apart from a rather passing reference to *Cruz* the majority below did not reach its decision because of *Cruz*. Pet. App. 3a. The majority looked at the evidence produced at trial and found it wanting. Pet.

App. 4a-8a, 10a[2] or as said by the United States "The majority held that the evidence presented at the second trial was insufficient." Brief for the United States, p. 5.

Indeed, in a strong dissent below, the quality and quantity of the evidence was examined carefully and at length. Apart from a footnote reference indicating that the panel was bound by *Cruz* the dissent below examined the evidence and found in its view that it was sufficient to sustain the conviction. Pet. App. 21a. However, that view did not command the majority.

Clearly, had the dissent read the majority opinion as being decided and mandated solely by application of the *Cruz* rule, there would have been little need for the dissent to express at length a differing view as to sufficiency of the evidence from the trial. Pet. App. 21a-34a. The dissent disagrees with the majority that the evidence was insufficient. Pet. App. 42. The dissent does not disagree that the panel was bound by *Cruz*; Pet App. 21. However, *Cruz* did not dictate the result in this case; differing views as to the sufficiency of the evidence did.

This Court does not normally resolve questions as to the sufficiency of evidence determined by Courts of Appeal[3]. "As such, we are presented primarily with a question of fact,

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[2] To be sure, the concurrence suggested that *Cruz* dictated the result. Pet. App. 14a; however, that view did not form the predicate for the resulting reversal of the conviction below. "Having said this [. . . we are bound by *Cruz*] however, I also concur in the majority holding that the evidence presented at this second trial was again insufficient. . .". Pet. App. 15a.

[3] *Cruz* may or may not be "good law". Brief for the United States and infra. On the other hand, the reversal of the decision in this case to reach what may be a wrong decision in *Cruz* seems draconian. It may be that a way around that connundrum would be to remand to the Court below for a determination whether it's decision would be the same without reference to *Cruz*. If so, this case would not be the vehicle to examine *Cruz*; if not, it may be. However, on remand that question would be more clearly set forth.

which does not merit Court review." *Hendricks v. Cty. Rural Electric Corp*, 454 U.S. 170, 176 n. 8 (1981). Also see Justice Holmes' unadorned "We do not grant *certiorari*, to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925).

II. A CONSPIRACY SHOULD TERMINATE WHEN ITS OBJECTIVE HAS BEEN FRUSTRATED OR BECOME IMPOSSIBLE TO ATTAIN AS A CONSEQUENCE OF GOVERNMENTAL INTERVENTION.

The United States well canvasses the history and the law of conspiracy in its Brief. It would be idle to suggest that the history and law generally of conspiracy are otherwise than set forth by the United States.

However, it may not be idle to reflect on whether that history and that law ought not be carefully examined in the context of the question presented here and in the context of further development of the law and the application of the law of conspiracy.

If, as Professors Perkins and Boyce note "Conspiracies are made punishable because of the increased dangers in group offenses." *Criminal Law*, Perkins and Boyce, 3rd Edition, 1982, p. 689, and if traditionally it has been seen that conspiracies are terminated by abandonment or accomplishment, *United States v. Kissel*, 218 U.S. 601 (1910), it may be time to inquire as to what policy considerations are advanced by a rule of law that a conspiracy does not end by government frustration of its purposes.

As is well noted in the cases cited by the United States in its Brief, the wellspring of conspiracy is in the dangerousness of the combination of action and the combination of players.[4]

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[4] See generally Francis B. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922) ". . . it is high time to abandon the prevalent and often

Thus, it is suggested that concerted action is more probable of success, and thus more dangerous and offensive to the safety and security of society than are individual actions. That being said and likely true, then what is there in an actor joining a conspiracy under the watchful eye of government law enforcement officials that connotes either a greater likelihood of success or more dangerousness or offensiveness to society in general than would be posed if that same actor were acting alone? Nothing. The conspiracies here and in *Cruz* were not going to succeed. They had been effectively, if not legally, terminated by governmental intervention. The drugs in neither case were going to be sold to ultimate consumers. Both here and in *Cruz* there was no chance of successful completion of the goals of the alleged conspiracies. Indeed, in both instances the conspiracies were formed in part by government agents. Superseding Indictment, Pet. App. 69a-70a.

Thus, if the rationale for penalizing the conspiratorial agreement is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts," Brief for the United States 12-13, citing *Callanan v. United States*, 364 U.S. 587, 593 (1961), then the rationale is surely to be found wanting when the conspiracy is formed in part, joined in part, and wholly observed by government law enforcement agents. This is not to suggest that the behavior of one who seeks to join the conspiracy being directed in part and watched in whole by law enforcement agents ought be ignored. Here, Respondent Recio was convicted of another substantive crime. Pet. App. 2a. That would most often be the case and thus there would be no such *panacea* for miscreants as the government suggests if the question posited here is answered affirmatively. Brief for the United States 24-26. "But

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repeated idea that mere combiniation in itself can add criminality or illegality to acts otherwise free from them." at 437.

statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges". *Krulewitch v. United States*, 336 U.S. 440 (1949), J. Jackson concurrence at 457.

To be sure, it might be well and it might be time to reflect on the whole of Justice Jackson's concurrence in *Krulewitch* on the nature of conspiracy and conspiracy prosecutions. Conspiracy is "an elastic, sprawling and pervasive offense" Justice Jackson indicated in *Krulewitch* at 445. That the law of conspiracy is confusing and complicated cannot be gainsaid. For if the Ninth Circuit misapplies the rule of when a conspiracy terminates in *Cruz*, as is argued by the United States, what can be made of the subsequent determination of the Court of Appeals for the District of Columbia Circuit that "Contrary to the government's assertion that impossibility as a matter of law is not a defense to conspiracy, it clearly is in this context", *In Re Sealed Case*, 223 F. 3d. 775 (D.C. Cir. 2000). That the Court there probably came to that conclusion by a misreading of *United States v. Hsu*, 155 F. 3d. 189 (3d. Cir. 1998) adds to, not detracts from, Justice Jackson's suggestion that "the modern crime of conspiracy is so vague that it almost defies definition" *Krulewitch*, concurrence at 446.

The United States argues that the *Cruz* rule ". . . would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objective for fear that such action will compromise the government's ability to prosecute all of the guilty participants." Brief for the United States p. 27. To the same end is the argument that *Cruz* would require, *inter alia*, ". . . the prosecutor to determine whether for each defendant, the evidence would ultimately be held sufficient to support a conclusion of pre-seizure participation in the conspiracy." Brief for the United States, p. 28. To be sure, the arguments

assume one can be guilty without participation, and they assume further that neither law enforcement nor prosecutors are capable of making these fine distinctions that set our system of justice apart from those where burdens of proof, persuasion and going forward are shifted. Respondent Recio does not share that negative view of law and prosecutorial enforcement abilities and the willingness to perform the tasks assigned to them.

It may be that *Cruz* would require more precision in drafting indictments than was shown here. Superseding Indictment, Pet. App. 69a-70a. On the other hand, notwithstanding the continued viability of Judge Learned Hand's observation those many years ago that a count of conspiracy may be ". . . that darling of the modern prosecutor's nursery. . ." *Paine v. United States*, 7 F. 2d. 259, 263 (2d Cir. 1925), neither the passage of time nor the evolution of the law eliminates the requirement that the modern prosecutor perform those functions peculiarly assigned, under our system of justice, to them. Those functions include the responsibility to make the fine distinctions that inhibit criminal activity from going forward and to determine for each defendant his/her requisite responsibility and role in the offense to be charged. Our system of justice requires no less and *Cruz* requires no more.

If we look at the historical purposes of the law of conspiracy, look too at how those purposes have been applied in the not so long line of conspiracy cases, then it may be well to examine the predicate for why a conspiracy ought not end as a matter of law when the government frustrates its objective.[5] That we may resolve in 2002 that question

[5]*See*, Developments in Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959). "Although it seems clear that the conspiracy ended with the frustration of its purpose, the Court reasoned that "come what may", the determination of the conspiracy not to pay whatever part of such taxes that they could still evade was doubtless present." Citing *United States v. Goldstein*, 135 F. 2d 359, 361 (2d Cir. 1943).

posited in 1959 by the note author of 72 Harv. L. Rev. 920 (1959) at 961 and thought to be "clear", Respondent Recio would suggest lends support for the result reached in *Cruz* by the Ninth Circuit even if not at all readily supported by other Courts. It may be that the note author was prescient in 1959 or it may be, Respondent Recio would urge, that the Ninth Circuit was in *Cruz*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, in the alternative the Court should remand for a determination of whether the decision reached below would be the same without reference to the holding in *Cruz*.

Respectfully submitted,

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